IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 529

MARIE DeSYLVA,

Petitioner,

vs.

MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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Dated: March 6, 1956

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OPINIONS BELOW

The opinion of the district court (R. 29-32) is not reported. The majority opinion (R. 47-67) of the United States Court of Appeals for the Ninth Circuit is reported at 226 F. 2d 623 and dissenting opinion (R. 67-71) of Judge Fee therein is reported at 226 F. 2d 634.

JURISDICTION

The judgment of the district court in favor of defendant (petitioner herein) and against plaintiff, was entered on April 29, 1953 (R. 33-34). The judgment of the United States Court of Appeals, Ninth Circuit, reversing the judgment of the district court, was entered August 25, 1955 (R. 72). No petition for rehearing of said cause in that court was filed. Petitioner filed her petition for a writ of certiorari on November 21, 1955, and such petition No. 529 was granted January 9, 1956 (R. 73).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) (1952).

STATUTORY PROVISIONS

This case involves the construction of the Copyright Act, 17 U. S. C. § 24 (1952), set forth in Appendix A.

QUESTIONS PRESENTED

1. When the author is dead, does 17 U. S. C. § 24 (1952) confer the renewal and extension of his statutory copyrights accruing during his widow's lifetime, exclusively upon her?

2. Does the term "children", as used in 17 U. S. C. § 24, (1952) include an illegitimate child?

STATEMENT OF THE CASE

George G. DeSylva, who died July 11, 1950, was an author and composer of musical works, many of which were copyrighted during the last 28 years of his life. Since his death, a number of copyrights were renewed in the name of Marie DeSylva, his widow and petitioner herein. Other copyrights will, in the future, come up for renewal (R. 4, 5, 12).

Stephen William Ballentine is the minor illegitimate son of George G. DeSylva and Marie Ballentine, who were not married at the time of his birth or at any other time (R. 20-21). Marie Ballentine, as mother and guardian of the estate of Stephen William Ballentine, filed a complaint in the district court on August 8, 1952, contending that Stephen William Ballentine, as the son of Mr. DeSylva, was equally entitled with the petitioner widow, Marie DeSylva, to the renewals and extension of the copyrights above mentioned. The complaint prayed for a declaratory judgment and an accounting (R. 3-7).

Petitioner, on January 7, 1953, filed her answer therein, contending that in accordance with the provisions of 17 U. S. C. § 24 (1952) relating to the extensions and renewals of copyrights, she, as the widow of George G. DeSylva, is the sole owner of the renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest, and that the said Stephen William Ballentine is not a child of the deceased, George G. DeSylva, within the meaning of 17 U. S. C. § 24 (1952) (R. 12-14).

Motions were made by both parties for summary judgment (R. 14, 24, 25).

In a judgment entered April 29, 1953, the district court held that in accordance with 17 U. S. C. § 24 (1952) so long as petitioner, Marie DeSylva, is alive, she, as the widow of George G. DeSylva, is the sole owner of renewals and extensions of copyrights in which George G. DeSylva had an interest (R. 33-34).

Respondent appealed from this judgment (R. 35).

In its findings of fact and conclusions of law filed in support of this judgment, the district court found that the respondent herein is "a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights" (R. 29-32). Petitioner herein appealed from this conclusion (R. 35).

Both appeals were decided against petitioner in the decision of the United States Court of Appeals for the Ninth Circuit (R. 47-67), Judge Fee dissenting on jurisdictional grounds (R. 67-71).

ARGUMENT

The issues presented by this case will be determined by this Court's judicial interpretation of provisions of the Copyright Act 17 U. S. C. § 24 (1952) which provide:

> "* * * That * * * the author of such work, if still living, *or the widow, widower, or children of the*

> *author, if the author be not living*, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work * * *." (Emphasis added)

The court below (R. 47-67) decided that the widow and children of a deceased author share the renewal and extension of the author's copyrights. The opinion is silent as to the apportionment or division of the copyright renewals between widow and children. The court holds further that respondent, admittedly an illegitimate child, is a "child" within the meaning of the statute.

For the reasons hereinafter advanced, petitioner contends that the court below has erroneously decided both issues. The wording of the statute is clear and unambiguous. By its terms, upon the death of the author, his widow is granted the exclusive benefits of copyright renewals during her lifetime and after her death such rights accrue to the children of the author. Further, petitioner contends that Congress did not intend that the illegitimate child should share with legitimate children in the ownership of renewal rights.

POINT I

WHEN THE AUTHOR IS DEAD THE RENEWAL OF A COPYRIGHT BECOMING RENEWABLE DURING HIS WIDOW'S LIFETIME IS EXCLUSIVELY HERS UNDER THE PROVISIONS OF THE COPYRIGHT ACT 17 U. S. C. § 24 (1952)

(1) The court of appeals has erroneously construed the clear, unambiguous and plain meaning of the statute.

We are here concerned with the interpretation of a federal statute, and petitioner asks only that the time-honored rules with respect thereto be followed by this Court. As

stated in *Stearns* v. *Siegel*, 117 Fed. 13, 18-19 (8th Cir. 1902):

> "There is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses, and no room is left for construction."

Chief Justice Marshall of this Court warned many years ago of the danger of disregarding "the plain provision" of an instrument, and stated in *Sturges* v. *Crowninshield*, 17 U. S. (4 Wheat.) 122, 202 (1819):

> "But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."

The meaning of the language of the statute in question is clear and unambiguous, and it certainly cannot be said that either absurdity or injustice results from its apparent and plain meaning.

In emphasizing the absence of a "qualifying phrase" (R. 50) between the words "widow * * * or children", the court of appeals has ignored the clear disjunctive "or" that separates them and has failed to realize that such, in its plain ordinary meaning, creates a division and preference within the so-called "family" class. Thus, the phrase in fact is substitutional and gives such rights as are granted therein first to the widow and then to the children. The court of appeals has unnecessarily supplemented the clear wording of the statute by reading into it the word "either" and concluding therefrom that they were giving to "or" as used in the phrase "widow * * * or children" in section 24

its "full disjunctive meaning" (R. 53). In fact the court of appeals did exactly the opposite. Far from giving the phrase its "full disjunctive meaning", the court of appeals in effect rewrote the statute to give that phrase a *conjunctive* meaning, so as to make it read "widow * * * *and* children".

The court of appeals has erred in construing the "right" conferred under section 24 as the right to "act" (R. 54, 56) or in other words the right to file application for renewal of copyright. The persons named in sequence in section 24, under its clear language, are those persons who are "entitled to a renewal and extension of the copyright". Indeed, to read the sequence or enumeration of section 24 only as a statement of those who may file applications for renewal rather than as those who are entitled to own the renewal and extension of copyright leaves the section without any reference to those who are entitled to own the renewal and extension. It is respectfully submitted that this would be an absurd result.

The copyright law now in force does not prescribe who may file application for renewal of copyright. Section 24 while providing that the person named shall have the renewal copyright "when application for such renewal and extension shall have been made" does not specify those who may file such application. In fact, the application form for renewal of copyright, Form "R", issued by the Copyright Office provides for the enumeration of those claiming the renewal but does not require the signature or name of the person actually filing for such renewal in their behalf.

The inevitable conclusion and result of the court of appeals' decision is, of course, that widow *and* children share the renewal copyright on the death of the author and share all benefits derived from such renewal.

It is apparent, therefore, that the court below has failed to give the word "or" as used in the statute its plain and ordinary disjunctive meaning and has in effect substituted

therefor the conjunctive "and" to include the widow and children as sharing in the same class.

That the words "widow or children" are intended to create a substitutional gift to the children in the event the widow shall have died is made extraordinarily clear when we look to the construction and interpretation of this phraseology in an analogous situation.

Although section 24 is not strictly a testamentary transfer of the copyright renewal from the author to his or her "widow, widower, or children", it is analogous to a testamentary disposition; and the construction by the courts of similar language in wills is analogous, if not controlling. There can be no doubt that such language contained in a will would by itself result in a construction that the word "or" renders the gift to the children substitutional only and that they would be entitled to receive the renewal right only in the event the widow had predeceased the testator author.

Thus, in *Matter of Lane*, 79 Misc. 71, 140 N. Y. Supp. 602 (Surr. Ct. Kings Co. 1913), the first paragraph of a will, the form of which was reproduced in later provisions, read as follows:

> "*First*. I give and bequeath to Walter A. Lane, or his child, one quarter interest or share, in the house No. 46 Fourth place, in the city of Brooklyn, N. Y."

In holding that the gift to the child in the quoted paragraph, and the gifts to children of the legatees in other similar paragraphs, were substitutional only, the court stated as follows:

> "Each of these efforts of the testatrix to make a disposition of her estate must be indulgently regarded, and the first commanding thought is that nobody can sanely doubt that the testatrix meant to make gifts in each case to a parent if he survived her and to his child or children if he did not so survive. Language which would be understood by all man-

> kind to be adequate to a given result must not only be taken to represent a subjective purpose in the mind of the testator but must be considered as a sufficient record of such purpose."

Similarly, in *Bender v. Bender*, 226 Pa. 607, 75 Atl. 859 (1910), a decedent in his will left a "House and lot to go to Johannes Bender or his children." The lower court held that the word "or" should be read as "and" and granted to Johannes only a life estate in the property. In reversing this judgment and holding that Johannes Bender received a fee simple in the property and that his children would have been entitled to the property only in the event that Johannes Bender had predeceased the testator, the court stated as follows:

> "Were the devise uncertain because of ambiguity in some of the words used, it is quite possible that sufficient could be found in other parts of the will to resolve the doubt: but entirely intelligible and complete in itself, no borrowed light is needed for any purpose in connection with it. * * * 'The simplest form of a substitutional gift is effected by the use of the word "or" which is usually construed as implying substitution.'"

In stating the circumstances that must exist before words will not be given their ordinary and understandable meaning, this same court stated (p. 861):

> "We do not say that the change may not be proper in any such case; but the reasons justifying it must not only be found in other parts of the will, but they must be *positively compelling to the common understanding.*" (Emphasis added)

Such rule that a testamentary gift in form to a person *nominatim* "or his children" results in a construction that the children have a gift only by substitution in the event of the death of the named person prior to the death of the testator appears to have been established in England at an

early date, *Penley* v. *Penley*, 12 Beav. 547, 50 Eng. Rep. 1170 (1850); and is well settled throughout the various jurisdictions in this country, *Tate* v. *Amos*, 197 N. C. 159, 147 S. E. 809 (1929); *Schaeffer's Adm'r* v. *Schaeffer's Adm'r*, 54 W. Va. 681, 46 S. E. 150 (1903); *Carlin* v. *Helm*, 331 Ill. 213, 162 N. E. 873 (1928); *Rolf's & Leising's Guardian* v. *Frischolz's Exr.*, 251 Ky. 450, 65 S. W. 2d 473 (1933); *Mead* v. *Close*, 115 Conn. 443, 161 Atl. 799 (1932).

(2) Petitioner's interpretation of the statute has been accepted by the courts, the commentators and the various industries dealing with copyrightable matter.

It has been assumed universally that the widow is first entitled to the renewal and extension of copyrights of her deceased husband-author, and, since 1870 when the language "widow or children" first appeared in our copyright law (Act of July 8, 1870, c. 230, § 88, 16 Stat. 212) no case has arisen, until now, in which the meaning of these words has been questioned.

As is forcibly demonstrated in the briefs filed herein by amici curiae, the various industries dealing with copyrightable matter have, without exception, construed the Act as granting the renewal copyright exclusively to the widow during her lifetime, and acting thereon have negotiated for, and acquired, rights of renewal from widows exclusive of children.

In this connection this Court in *Fred Fisher Music Co.* v. *M. Witmark & Sons*, 318 U. S. 643, 657-658 (1943) in finding that renewal interests are assignable was "* * * fortified in this conclusion by reference to the actual practices of authors and publishers with respect to assignments of renewals * * *".

Of particular bearing and significance to the issue herein discussed is Mr. Justice Frankfurter's statement in *Fred*

Fisher Music Co. v. M. Witmark & Sons, supra, 646 n. 2 as follows:

> "Ball and Olcott were no longer living at the time, and under § 23[*] of the Act *their interests in the renewal passed to their widows.*" (Emphasis added)

The order of succession to the copyright renewal is also set forth in *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909, 911 (2d Cir. 1921), *cert. denied*, 262 U. S. 758 (1923), where it is stated:

> "The purpose of the statutory renewal provisions is to give *to the persons enumerated in the order of their enumeration* a new right or estate, * * *." (Emphasis added)

It is clear that in the order of their enumeration, the widow separated by the disjunctive "or" takes preference over the children.

The commentators generally considered as authorities are agreed that the widow takes precedence over the children.

Shortly after the enactment of the 1909 Copyright Act, Assistant Attorney General Fowler rendered an opinion on the succession of the renewal copyright stating in part:

> "* * * and the third section mentioned, the one here applicable, required the extension or renewal to be procured by the author, if living, or if dead, *by the persons, and in the order, mentioned* in the preceding section, * * *." 28 Ops. Atty. Gen. 162, 165 (1910). (Emphasis added)

Similarly Richard C. DeWolf, who was an attorney in the Copyright Office when the 1909 Act was enacted, commented in respect of the renewal right as follows:

[*] The former § 23 referred to by Mr. Justice Frankfurter in the footnote to his opinion became § 24 by the Act of July 30, 1947, c. 391 § 1, 61 Stat. 652.

" 'The renewal can only be obtained by the beneficiaries expressly named in the law, and by them in the order named, i.e., the person having the first right is the author, if living at the end of the original term; *if he is not living, then the widow or widower, is entitled to renew; if there is no widow or widower, the children come in*; * * *.' " An Outline of Copyright Law 66 (1925)

Corpus Juris comments as follows:

"In all other cases the right of renewal of such subsisting copyrights is in the author, if living, or in the author's widow, widower, children, executors, or next of kin, *in the order stated*, if the author be dead." 13 C. J., *Copyright and Literary Property* § 239 (1917) (Emphasis added)

American Jurisprudence is to the same effect:

"The purpose of the renewal provision in the copyright statute is to give to the persons enumerated, *in the order of enumeration*, a new right or estate * * *." 34 Am. Jur., *Literary Property and Copyright* § 32 (1941) (Emphasis added)

Margaret Nicholson in her *A Manual of Copyright Practice* (1945), at page 195, 196 states:

"The publisher may renew the copyright in the name of the widow or widower, if there is one; of the child or children, *if there is no widow or widower*; * * *." (Emphasis added)

Similarly Samuel Spring, in *Risks and Rights in Publishing, Television, Radio, Motion Pictures, Advertising, and the Theater* (1952), at page 94 states:

"The succession of these successive classes of holders to the exclusive right to renew is rigidly enforced. Each holder succeeds to his right of renewal in strict order of priority. Thus an author's children cannot renew the term if the author's 'widow be living'; * * *."

(3) The legislative history supports petitioner's contention.

The court below places some emphasis on the fact that an early draft of the Copyright Act, in naming those entitled to renew, used the words "or in her default or if no widow survive him by his children" (R. 51). From the absence of this language in the 1909 Act, the inference is drawn that it was the intention of Congress that the widow and children were in an inseparable class and shared the renewal copyright. Such an inference is not warranted. If it were the intent of Congress that widow *and* children should share the renewal copyright this could easily have been accomplished by the simple substitution of the conjunctive "and" for the disjunctive "or". In fact the "early draft" (R. 51) referred to by the court of appeals is part of an unenacted bill, H. R. 19853, 59th Cong., 1st Sess. (1906), the substance of which with respect to terms of copyright was completely discarded with the adoption of the 1909 Act. It is clear, therefore, that Congress in enacting a new Copyright Act in 1909 adopted and continued the clear language of the 1870 Act, namely "widow or children", inserting only the word "widower" so that the phrase now reads "widow, widower, or children", which modification, of course, does not in the slightest change the clear meaning of the disjunctive "or" as used in both statutes. If any inference is to be drawn from the rejection of this "early draft", it is that the language as finally adopted better and more succinctly expressed the congressional intent.

Reference to the history of the Act lends support to petitioner's argument.

Copyright legislation was first Congress in 1790 and the renewal copyright w nfined to the original author and his "* * * executors, administrators or assigns * * *". (Act of May 31, 1790, c. 15, § 1, 1 Stat. 124) Thus the renewal right was treated like any other

property and was subject to testamentary disposition by the author without restriction.

In 1831 the Copyright Law was changed and the renewal copyright was then dealt with as follows:

> "* * * That if, at the expiration of the aforesaid term of years, such author, * * * being dead, shall have left a widow, or child, or children, *either or all then living*, the same exclusive right shall be continued to such author, designer, or engraver, or, if dead, then to such *widow and child, or children*, for the further term of fourteen years: * * *." Act of February 3, 1831, c. 16, § 2, 4 Stat. 436. (Emphasis added)

It is clear that in 1831 Congress intended that the widow *and* children of a deceased author should share the renewal term of copyright and accomplished that purpose by use of the conjunctive "and".

The 1831 renewal provision remained unchanged until the Act of July 8, 1870, c. 230, § 88, 16 Stat. 212, which provided:

> "* * * That the author, inventor, or designer, if he be still living, and a citizen of the United States or resident therein, or his *widow or children*, if he be dead, shall have the same exclusive right continued for the further term of fourteen years * * *." (Emphasis added)

The substitution of the disjunctive "or" for the conjunctive "and", together with the omission of the phrase "either or all then living", cannot be interpreted as a mere matter of chance.

The use of the word "and" plus the clause "*either or all then living*" indicates a grant of the renewal right to those persons then living *as a class*. The 1870 Act which dropped the words "*either or all then living*" and changed the conjunctive "*and*" to the disjunctive "or" constitutes a substitutional grant to the widow, or if there be no widow

them to the children. The 1909 Act, which still is in effect, continues the use of the disjunctive "or".

(4) To grant the right to renewal and extension of copyrights first to the widow and upon her death to the children is in accord with the intention of Congress in this and other fields of legislation.

To prefer the author's widow in the granting of renewal rights in most cases is consistent with the wishes of the author, the creator of those rights. Normally the widow of an author is the mother of his surviving children and their interests are compatible. If the children are minors it is essential that she have the exclusive and unrestricted ownership of the renewal rights of her deceased husband's copyrights so that she may better provide as the surviving head of the family. In fact as stated in the opinion of the court below (R. 54):

> "* * * and in many states including California parents are legally liable to support their children."

Accordingly granting preference to the widow with respect to the renewal copyright does not mean that the children are excluded from the "author's bounty" and upon the death of the widow the renewal copyright becomes the property of the children. Surely Congress had the normal situation in mind, rather than the unusual and exceptional case such as the one presented here.

The opinion of the court below seems to be based on the unwarranted fear that a mother will disinherit her worthy children or an unworthy stepmother will profit at the expense of the author's children by a previous marriage. It is respectfully submitted that such cases are few and no statute can be so drawn as to, in all cases, avoid occasional hardship.

It is not unusual for statutes, both federal and state, to prefer a widow as against the children of a deceased husband in the apportionment or allocation of property rights originating with the husband.

For example, under 28 Stat. 964 (1895), 38 U. S. C. § 96 (1952) a federal pensioner's accrued pension "* * * shall inure to the sole and exclusive benefit of the wi[illegible] or children", with the widow taking to the exclusion of the children if she be living at the death of the pensioner.

Widows of Army or Air Force officers receive an allowance to the exclusion of a child or children on the death of such officer, 41 Stat. 367 (1919), 10 U. S. C. § 903 (1952).

If the person making the original entry upon public lands be dead, his widow is preferred in completing and perfecting such entry, 37 Stat. 123 (1912), 43 U. S. C. § 164 (1952).

(5) The opinion and judgment of the court below destroys the intended meaning of the statute and the rights created thereunder.

The only construction of section 24 of the 1909 Act that gives it clarity and meaning is that which gives the whole and exclusive renewal and extension of copyright to the widow during her lifetime. To adopt the construction of the court below leaves entirely unanswerable the vital question: How much does the widow take and how much the children? The learned judges below have completely failed to consider this question and after deciding that the widow and children are to share these rights as a class, they have left the division of such rights to speculation and conjecture. If their judgment is to hold, does the widow take one half and the children the other half? Or are these rights to be divided per capita between the widow and children? Certainly it was not intended that the quantum of the widow's share should depend upon the number of children, with the possibility of her share being reduced to a paucity. The clear language of the statute contemplates no such strained interpretation as rendered by the court of appeals.

It is respectfully submitted that for any court to attempt to spell out the shares of the renewal copyright a widow and

children shall take in all situations would amount to nothing less than judicial usurpation of the legislative powers reserved to Congress by the Constitution. U. S. Const. art. I § 1.

The interpretation of this statute as contended for by petitioner, gives to the statute clarity of meaning and completeness and lends logic and persuasion to its adoption by this Court.

POINT II.

AN ILLEGITIMATE CHILD IS NOT A "CHILD" WITHIN THE MEANING OF THE COPYRIGHT ACT 17 U. S. C. § 24 (1952)

Petitioner contests the finding of the court of appeals that respondent, admittedly illegitimate, is a child within the meaning of the renewal provisions of the Copyright Act. It is important at this point to clarify the status of respondent's ward Stephen William Ballentine. Pursuant to stipulation (R. 20-21) Stephen William Ballentine is the son of George G. DeSylva, deceased, and Marie Ballentine, born out of wedlock. He was an heir of his father within the meaning of section 255 of the Probate Code of the State of California (App. B), but was never legitimated under the provisions of section 230 of the California Civil Code (App. C).

Under section 255, an illegitimate child is declared to be an heir of his mother and of his father if such father acknowledges him or adopts him into his family. Section 230 of the Civil Code provides for legitimation for all purposes of an otherwise illegitimate child by his father and his father's wife *with her consent.*

Stephen William Ballentine was acknowledged by George G. DeSylva during his lifetime so as to bring him within the provisions of section 255; but as the court of appeals points out, there is no allegation or proof sufficient

to bring Stephen William Ballentine within the meaning of section 230 of the Civil Code (R. 63). *Thus, it has been clearly established that the respondent's ward for the purposes of this discussion is to be considered an illegitimate child.*

It is the position of petitioner that both under the English common law as adopted by our several states and under American statutes, federal and state, the words "child" or "children" mean only a legitimate child or children unless otherwise expressly stated. Further, that under section 24 of the Copyright Act the word "children" as used therein refers only to legitimate children, and that therefor respondent's ward is not a person included in the provisions of that Act.

At common law, an illegitimate child meant *filius nullius*, the child of nobody, or *filius populi*, a child of the public. Such a child had no father known to the law and indeed not even a mother. (See 7 Am. Jur. *Bastards* § 3 (1937)) So deeply entrenched in the common law was this concept that in a suit brought by an illegitimate child against a railway company for damages for his father's death, under Lord Campbell's Act, the court held that the word "child" in the Act did not include the plaintiff illegitimate. *Dickinson* v. *North-Eastern Railway Company*, 9 L. T. R. (n. s.) 299 (1863).

We believe the controlling authority in this Court on this subject is *McCool* v. *Smith*, 66 U. S. 459, 470 (1861), in which Mr. Justice Swayne said:

> "By the rules of the common law, terms of kindred, when used in a statute, include only those who are legitimate, unless a different intention is clearly manifested. This is conceded by the counsel for the defendant in error. The proposition is too clear to require either argument or authority to sustain it."

A case of more recent origin, evidenced by *Louie Wah You* v. *Nagle*, 27 F. 2d 573 (9th Cir. 1928) is particularly close to the case in hand in that it directly is concerned with construction of a United States statute. In that case the appeal was from an order of the United States District Court quashing a writ of habeas corpus, and in it the appellant claimed United States citizenship as a person born of a United States citizen. The appellant was the illegitimate offspring of a Chinese woman, born in China and of a man who was admittedly a United States citizen. At that time Rev. Stat. § 1993 (1875) provided:

> "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be * * * citizens thereof are declared to be citizens of the United States; * * *."

The court of appeals held that the appellant because he was admittedly illegitimate was not included in the term "children" as used in the statute and therefore not entitled to his citizenship. Thus, here is a case concerned with a United States statute enacted in 1907 which creates a statutory right (that of citizenship), which uses the word "children" and which unequivocally refused to extend the use or meaning of that term so as to include an illegitimate child. See also *Ng Suey Hi* v. *Weedin*, 21 F. 2d 801 (9th Cir. 1927).

Manifestly there is nothing in the nature of the right to the copyright renewal that makes it different or more valuable than the cherished right of citizenship so as to grant one to the illegitimate and deny him the other. As recently as 1952 Congress recognized the distinction between legitimate and illegitimate children with the adoption of the Act of June 27, 1952 (66 Stat. 238, 8 U. S. C. § 1409 (1952)) which provides that children born out of wedlock and outside of the United States and its possessions may acquire citizenship only if paternity is established by legiti-

mation. Clearly this statute denies the right to citizenship to an illegitimate child born outside of the United States and its possessions of a parent who is a citizen, whereas the legitimate child born outside of the United States and its possessions of a parent who is a citizen is automatically granted such right.

We believe that a fair review of all statutes, federal and state alike, and the opinions of the courts on the subject as well, leads to the conclusion that at the present time, illegitimate children are still under historical restrictions and impediments except to the extent that they have been *expressly released therefrom by statute*. Further, such statutory release has been almost exclusively in the field of inheritance and succession and it is only where an intention to include them in a granted right is specifically spelled out that such is accorded them.

For example, Congress in providing for payment of veteran's pensions after the death of a veteran clearly distinguishes between a legitimate and illegitimate child in defining the term "child". 48 Stat. 481 (1934), 38 U. S. C. § 505 (1952).

We respectfully submit that this Court should also consider the effect on the marketability of copyrights of interpreting the word "children" in section 24 as including illegitimate children. Illegitimacy invariably by its very nature is shrouded in secrecy and the determination of paternity many times is not sought until after the death of the alleged father. In such circumstances on the death of a husband-author; for example, the marketability of copyright, which depends on exclusive and clear title to copyright, would be destroyed and the benefits withheld from the widow and legitimate children at a time when they would be in most need of such benefits, for the reason that the possibility of a claim by a later discovered illegitimate child would be a cloud on the clear title of the legitimate children.

We believe that a fair reading and review of the discussion by the court of appeals on this question of illegitimacy leads to the conclusion that they were mindful of the fact that authority was lacking to permit the inclusion of an illegitimate child within the terms of section 24 of the Copyright Act. Apparently that court feels that this is not the way the law should be, and in their words they have chosen to give to the Act what they call its "ordinary *lay*-language meaning" (R. 67). We respectfully suggest that the proper place to remedy such a situation, if such is necessary, is in Congress, and in the instant case we believe that until such is done the rule of stare decisis should be followed and respondent herein denied the status of a child in so far as the provisions of the Copyright Act are concerned.

CONCLUSION

Petitioner respectfully submits that this Court should reverse the judgment of the court below and find that petitioner herein is exclusively entitled to the renewals of copyrights in her deceased husband's works accruing during her lifetime, and further find that respondent's ward herein is not a "child" within the meaning of the Copyright Act 17 U. S. C. § 24 (1952).

Dated: New York, N. Y., March 6, 1956.

Respectfully submitted,

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APPENDIX A

17 U. S. C. § 24 (1952)

"§ 24. **Duration; Renewal and Extension.**

The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided,* That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication."

APPENDIX B

"§ 255. **Illegitimate child: Acknowledgment by father: Inheritance from father's kindred: Intermarriage of parents: Inheritance from mother's kindred.** Every illegitimate child is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father by inheriting any part of the estate of the father's kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child is deemed legitimate for all purposes of succession. An illegitimate child may represent his mother and may inherit any part of the estate of the mother's kindred, either lineal or collateral."

APPENDIX C

"§ 230. **Adoption of illegitimate child.** The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption."